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IN THE SUPERIOR COURT OF THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

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|---------------------------------|---|---------------------|
| STATE OF ALASKA, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| ALPHARMA BRANDED |) | No. 3AN-06-12026 CI |
| PRODUCTS DIVISION INC., et al., |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

DEFENDANT DURAMED PHARMACEUTICALS, INC.’S REPLY IN SUPPORT OF ITS INDIVIDUAL MOTION TO DISMISS THE AMENDED COMPLAINT

The State fails to address Duramed’s central argument for dismissal under Rule 12(b)(6): that the lack of *any* mention of *any* Duramed drug (much less any factual allegations relating to those drugs) requires dismissal of the Amended Complaint with respect to Duramed -- even under the most lenient pleading standards. The State instead

argues solely that Rule 9(b) does not apply to its claims and that lists of “targeted” drugs will be supplied later in discovery. Neither response can save the State’s Complaint.

Although the heightened pleading standard in Rule 9(b) plainly applies to the State’s UTPA claims -- as illustrated by the State’s own characterization of this case as a lawsuit challenging alleged “fraudulent schemes” (Am. Compl. ¶ 4.) --, Duramed’s motion made clear that the Complaint must be dismissed even if Rule 9(b) does not apply. (Duramed Mot. 2-3.) As Duramed explained, the Complaint fails even under Rule 8 because it does not identify a single Duramed drug that allegedly was sold or advertised in a deceptive manner, or the sale of which allegedly resulted in unjust enrichment. Without identifying the product or products at issue and what Duramed allegedly did wrong with respect to those products, no relief could be granted as to Duramed even if the allegations in the Complaint were taken as true. *See, e.g., Van Biene v. ERA Helicopters, Inc.*, 779 P.2d 315, 323 (Alaska 1989) (affirming dismissal of certain defendants because plaintiffs failed to identify any component manufactured by them); *see also Mountain View Pharmacy v. Abbott Labs.*, 630 F.2d 1383, 1387-89 (10th Cir.1980) (affirming dismissal under Federal Rule of Civil Procedure 8 as to 26 of 28 pharmaceutical company defendants because the complaint failed to identify any of their products as the subject of the allegedly wrongful conduct). In short, the State’s arguments about whether Rule 9(b) applies are a red herring because the Complaint fails to state a claim as to Duramed regardless of the pleading standard that governs.

The State also cannot avoid the basic pleading requirements of the Alaska Rules of Civil Procedure by forcing Duramed to engage in discovery to determine the basis of the State's claims. It is incumbent on the plaintiff to identify the product(s) that are the basis for its claims -- and the allegations relating to those products -- in the Complaint itself. Indeed, the State cites no authority for the proposition that a plaintiff can avoid dismissal of a facially defective complaint by claiming that the defendant will be able to discern the allegations against it through burdensome and costly discovery. The purpose of the pleading rules is to require the plaintiff to frame its claims at the outset. Litigation is not a moving target, or a game of hide and seek.

CONCLUSION

Because the Complaint fails to identify any Duramed drugs or make any factual allegations relating thereto, the Complaint must be dismissed as to Duramed.

Respectfully Submitted,

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